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In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF NEBRASKA, PLAINTIFF

v.

STATES OF WYOMING AND COLORADO

ON JOINT MOTION BY NEBRASKA AND WYOMING
TO REFER TO SPECIAL MASTER
THEIR MOTIONS FOR LEAVE TO FILE AMENDED PLEADINGS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

Nebraska has moved for leave to file an Amended Petition for an Order Enforcing Decree, and Wyoming has moved for leave to file Amended Counterclaims and Cross-Claims. The two States also have filed a joint motion requesting that their separate motions for leave to file amended pleadings be referred to the Special Master for his recommendation as to whether those motions should be granted. The United States does not oppose the joint motion by Nebraska and Wyoming to refer those motions to the Special Master.

A. On October 7, 1986, the State of Nebraska sought leave from this Court to file a petition for an order enforcing the Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), which established an interstate apportionment of the flow of the North Platte River. The

United States (which is a party to the Decree) responded that Nebraska appeared to identify a substantial interstate dispute and suggested that the Court grant the petition and appoint a Special Master to consider Nebraska's claims. U.S. Mem. 3-4 (filed Dec. 19, 1986). On January 20, 1987, this Court granted Nebraska leave to file its petition to enforce the Decree and instructed the parties to file answers. 479 U.S. 1051. On April 20, 1987, the Court granted Wyoming's motion for leave to file a counterclaim. 481 U.S. 1011. On June 22, 1987, the Court referred the case to Special Master Owen Olpin, 483 U.S. 1002, who filed First and Second Interim Reports. See 492 U.S. 903 (1989), and 112 S. Ct. 1930 (1992). The Second Interim Report recommended that the Court grant summary judgment in favor of the United States and Nebraska on the so-called Inland Lakes dispute (Second Interim Rep. 16, 19-35), grant partial summary judgment in favor of Nebraska on an issue concerning limitations on the use of Nebraska's apportionment (*id.* at 18-19, 89-100), and deny summary judgment on all other claims (*id.* at 17-19). The Court considered exceptions filed by the States, overruled them, and remanded the case to the Special Master for further proceedings. 113 S. Ct. 1689 (1993).

Over the course of these proceedings it instituted in 1986, Nebraska has moved to amend its pleadings three times, first in 1988, then in 1991, and now again in 1994. In its 1988 motion to amend the 1986 Petition, Nebraska sought a modification of the existing Decree to impose a requirement that Nebraska, Wyoming, and Colorado share the burden of maintaining the stream flows necessary for critical wildlife habitat along the Platte River. In its response to Nebraska's motion, the United States observed that the motion, if granted, "would greatly expand the scope, character, and complexity" of the case.

U.S. Mem. 3 (filed Feb. 12, 1988). The Court denied Nebraska's motion to amend its 1986 Petition. 485 U.S. 931 (1988).*

On October 9, 1991, Nebraska again sought leave to amend its 1986 Petition. The 1991 proposed Amended Petition presented three claims:

Count I sought an amendment of the Decree "to apportion the unapportioned, non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows." 1991 proposed Amended Petition, para. 20.

Count II sought to enlarge the claim for relief set forth in the 1986 Petition, alleging violations of the existing Decree by Wyoming through excessive use of natural flow and ground water for irrigation, depletion of storage water, depletion of return flows reaching the North Platte River, and excessive consumption of water on tributaries entering the North Platte River below Alcova Reservoir. Compare 1986 Petition, pages 3-4, with 1991 proposed Amended Petition, para. 2 and page 13.

Count III, which requested relief against the United States for the first time, alleged that the United States was violating the Decree by "[c]ontracting for the use of Glendo Reservoir water for other than authorized purposes" and "[a]llocating

* The United States had suggested that Nebraska's motion to amend its 1986 Petition be referred to the Special Master for a recommendation as to whether the Court should grant the motion. U.S. Mem. 4-5 (filed Feb. 12, 1988).

natural flows among its contractors in designated water-short years," in violation of paragraphs V, VI, and XII of the existing Decree. 1991 proposed Amended Petition, Count III, para. 2.

This Court denied Nebraska leave to file Count I of the 1991 proposed Amended Petition, and it referred Counts II and III to the Special Master for his recommendation as to whether Nebraska's motion for leave to file those counts should be granted. 113 S. Ct. 1941 (1993). That referral is pending before the Special Master.

B. Both Nebraska and Wyoming now seek leave to amend their pleadings.

1. Nebraska's 1994 proposed Amended Petition, which is intended to "supersede" its 1986 Petition and its 1991 proposed Amended Petition (see Neb. Br. 2), presents four claims:

Count I reasserts the 1986 Petition's challenge to Wyoming's proposed construction of storage capacity on tributaries. Compare 1986 Petition, para. 3c, with 1994 proposed Amended Petition, Count I, paras. 11a, 12. It also reasserts the claims presented in Count II of Nebraska's 1991 filing, which is now pending before the Special Master for his recommendation. Compare 1991 proposed Amended Petition, Count II, para. 2, with 1994 proposed Amended Petition, Count I, paras. 11, 12.

Count II reasserts one, but not both, of the claims presented in Count III of Nebraska's 1991 filing, which is also currently pending before the Special Master for his recommendation. Compare 1991 proposed Amended Petition, Count III, para. 2(a), with 1994 proposed Amended Petition, Count II, paras. 3-4. Count II alleges that "[t]he United States is

presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by contracting for the use of Glendo Reservoir water for other than authorized purposes." 1994 proposed Amended Petition, Count II, para. 4.

Count III reasserts, albeit with greater specificity, the Laramie River claims presented in Nebraska's 1986 Petition. Compare 1994 proposed Amended Petition, Count III, para. 6, *with* 1986 Petition, paras. 3a, 3b. It seeks, in addition, an apportionment of Laramie River inflows to the North Platte River, and to have the Court "enjoin the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River and from impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement." 1994 proposed Amended Petition, page 11. The relief requested appears to be consistent with this Court's 1993 conclusion (113 S. Ct. at 1698) that Laramie River inflows to the North Platte River were expected to contribute to the natural flows that would be available for the 1945 apportionment of the River but were not specifically apportioned by that Decree.

Count IV of the 1994 proposed Amended Petition (like Count I of Nebraska's 1991 filing) seeks equitable apportionment of the non-irrigation season flows of the North Platte River. Compare 1991 proposed Amended Petition, Count I, page 11, *with* 1994 proposed Amended Petition, Count IV, page 16. Count IV alleges that "irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation, and fish and wildlife, includ-

ing endangered and threatened species," in Nebraska rely on non-irrigation season flows (para. 7), which "existing and proposed developments in Wyoming threaten to utilize and deplete" (para. 9).

In sum, Nebraska's 1994 proposed Amended Petition appears to encompass all of the claims in its pending 1986 Petition and most of the claims in its 1991 proposed Amended Petition—including a requested modification of the existing Decree to apportion non-irrigation season flow. The Court denied leave to file the latter claim, without prejudice, last year, following the Special Master's recommendation that it was not ripe for resolution. 113 S. Ct. 1941 (1993).

2. Wyoming, for the first time, also seeks to amend its pleadings. Specifically, Wyoming proposes to amend its pending counterclaim and to add two new counterclaims against Nebraska and five new cross-claims against the United States. Wyoming's pending counterclaim, which the Court granted it leave to file in 1987, alleges that Nebraska is violating the decree by "demanding natural flow * * * in excess of the present beneficial use requirements of the Nebraska lands entitled to water * * * under the Decree," by "demanding natural flow and storage water * * * for uses below Tri-State Dam that are not recognized or authorized by the Decree," and by "using Glendo Reservoir water outside of the basin of the North Platte River." 1987 Counterclaim para. 2(a)-(c). A central premise underlying the first two of those claims—that paragraph V of the existing Decree imposes upper limits on Nebraska's diversions—was rejected by the Court in the 1993 decision. 113 S. Ct. 1700-1701.

Wyoming's 1994 filing responds to that ruling and seeks additional relief against both Nebraska and the United States:

Wyoming's First Counterclaim and First Cross-Claim both seek an amendment of the Decree in response to the Court's conclusion that paragraph V of the existing Decree imposes no specific upper limits on Nebraska's right to divert water. The First Counterclaim seeks modification of the Decree "to confirm that equitable apportionment does not allow Nebraska to demand direct flow water from Wyoming for use below Tri-State Dam" and "to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree." 1994 proposed Amended Counterclaims and Cross-Claims, page 6. The First Cross-Claim seeks analogous relief against the United States. *Id.*, page 11.

Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims (like Count II of Nebraska's 1994 proposed Amended Petition) deal with contracting practices for water stored in Glendo Reservoir, which are addressed in paragraph XVII of the existing Decree. The Second Counterclaim and Cross-Claim allege that Nebraska and the United States have violated the Decree by delivering, or permitting the delivery of, "storage water from Glendo Reservoir * * * for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements," and they seek to enjoin Nebraska and the

United States from committing those alleged violations. 1994 proposed Amended Counterclaims and Cross-Claims, paras. 15, 28 and pages 7, 11. The Third Counterclaim and Cross-Claim, which are styled as alternatives to their second counterparts, seek an amendment of the Decree to permit Glendo storage water to "be used directly or by exchange for all beneficial uses under the laws of the respective states." *Id.*, pages 7, 12.

Wyoming's Fourth Counterclaim and Fifth Cross-Claim seek modification of the method set out in paragraph V of the Decree for determining river "carriage' losses." The Fourth Counterclaim alleges that "data and technology" are available to make a more "accurate estimate of transportation losses than the estimate produced by use of the procedure required by Paragraph V of the Decree," and it seeks modification of paragraph V of the Decree to "leave such determination to state officials under state law." 1994 proposed Amended Counterclaims and Cross-Claims, para. 20 and page 9. The proposed Fifth Cross-Claim seeks the same relief against the United States and Colorado. *Id.*, page 13.

Wyoming's Fourth Cross-Claim alleges that the United States "has failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs," and it seeks declaratory and injunctive relief against the United States with respect to the operation of the federal projects and associated water storage contracts. 1994 proposed Amended Counterclaims and Cross-Claims, para. 31 and page 13.

C. Nebraska's 1994 proposed Amended Petition encompasses both the 1991 Count I seeking a non-irrigation season apportionment, which was rejected for filing without prejudice by the Court in 1993, and the two Counts of the 1991 proposed Amended Petition that are now pending before the Special Master. The proposed non-irrigation season apportionment, in particular, would substantially expand this litigation. Wyoming's proposed Amended Counterclaims and Cross-Claims would also expand the litigation beyond the scope contemplated by the counterclaim that the Court granted Wyoming leave to file in 1987.

Although we have serious reservations about the proposed amended pleadings to the extent they would lead to unnecessary or open-ended expansion of this litigation, we do not oppose the joint motion by Nebraska and Wyoming for referral of the proposed amendments of their pleadings to the Special Master for his consideration and recommendation in the first instance. That course of action will enable the parties to brief the issues in detail. It will also enable the Special Master, who is intimately familiar with this complex case and the interrelationship of the new issues now raised by the parties to the claims that the Court has already granted leave to file, to prepare a detailed recommendation that sorts out those issues he concludes are appropriate for resolution in this litigation at this time from those he concludes are not.

Accordingly, we suggest that the Court vacate its April 26, 1993, order referring Counts II and III of Nebraska's 1991 proposed Amended Petition to the Special Master and grant the joint motion by Nebraska and Wyoming to refer Nebraska's motion for leave to file an Amended Petition for an Order Enforcing Decree and Wyoming's motion for leave to file Amended Counter-

claims and Cross-Claims to the Special Master for his recommendation to the Court as to whether (or in what respects) those motions should be granted.

Respectfully submitted.

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